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No. 92-1911

Supreme Court, U.S.

FILED

DEC 14 1993

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1993**

**PUD No. 1 of JEFFERSON COUNTY  
AND CITY OF TACOMA, PETITIONERS**

*v.*

**STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,  
DEPARTMENT OF FISHERIES AND  
DEPARTMENT OF WILDLIFE**

**ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF WASHINGTON**

**BRIEF FOR THE UNITED STATES AS  
AMICUS CURIAE SUPPORTING AFFIRMANCE**

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### **QUESTION PRESENTED**

Whether the State of Washington exceeded its authority under federal law by conditioning a water quality certification under Section 401 of the Clean Water Act, 33 U.S.C. 1341, for a hydroelectric project subject to a federal licensing requirement on the potential licensee's maintenance of minimum stream flow to assure that the use of the body of water as fish habitat will be preserved.

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### INTEREST OF THE UNITED STATES

The Environmental Protection Agency (EPA) is responsible for administering portions of the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, and the Army Corps of Engineers is responsible for administering a regulatory program under Section 404 of the CWA, 33 U.S.C. 1344. The Federal Energy Regulatory Commission (FERC) is responsible for administering the Federal Power Act (FPA), 16 U.S.C. 791 *et seq.* In addition, federal agencies frequently have to obtain certifications under Section 401 of the CWA, 33 U.S.C. 1341, in connection with various activities and, with respect to this particular

case, the land on which the hydropower project would be built is located within the Olympic National Forest and is owned by the United States. The United States therefore has a substantial interest in questions concerning the extent to which the State of Washington may impose conditions under Section 401(d) of the CWA on a facility that must obtain a hydropower license issued by FERC under the FPA.

### STATUTES INVOLVED

The pertinent portions of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, are reprinted at App., *infra*, 1a-16a.

### STATEMENT

1. a. The Clean Water Act, 33 U.S.C. 1251 *et seq.*, is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through reduction and eventual elimination of the discharge of pollutants into those waters. CWA § 101(a), 33 U.S.C. 1251(a). In addition, Congress set as a national goal the attainment of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." CWA § 101(a)(2), 33 U.S.C. 1251(a)(2). To reach the stated goals, the Act anticipates a partnership between the federal government and the States.

The Administrator of the EPA is generally responsible for administering the Act. CWA § 101(d), 33 U.S.C. 1251(d). A major responsibility of the Administrator under the Act is to ensure that technology-based limitations are imposed on discharges. The Act thus provides for the development and promulgation of uniform national standards, known as "effluent limitations guidelines," for categories and classes of discharges from point sources and for the

imposition of limitations on a case-by-case basis. CWA §§ 301, 304, 33 U.S.C. 1311, 1314; *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 126-136 (1977). See CWA §§ 502(11) and (14), 33 U.S.C. 1362(11) and (14) (definitions of "effluent limitation" and "point source").

b. A second major source of authority for meeting the goals of the CWA is found in Section 303, which directs States, with federal approval and oversight, to institute a range of comprehensive standards, potentially more stringent than the national technology-based limitations, to assure protection of the quality of all state waters. 33 U.S.C. 1313(a), (b), and (c)(1). Such water quality standards provide "a supplementary basis \* \* \* so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 n.12 (1976).

Unlike the national industry-specific effluent limitations, state water quality standards are not technology-based requirements; instead, each State's water quality standards "define[] the water quality goals of a water body \* \* \* by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." 40 C.F.R. 131.2. See also CWA § 303(c)(2)(A), 33 U.S.C. 1313(c)(2)(A) (water quality standards "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses"). The CWA provides that "[s]uch standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of [the CWA]." 33 U.S.C. 1313(c)(2)(A). Echoing the goals of the Act stated in Section 101,



Section 303(c)(2)(A) also requires a State's water quality standards to take into consideration, for each water body examined, "their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes." 33 U.S.C. 1313(c)(2)(A). Under EPA's regulations, the water quality standards must include "[a]n antidegradation policy" providing generally that the existing uses of the water and the existing quality of the water shall be maintained and protected. 40 C.F.R. 131.6(d), 131.12(a). See CWA § 303(d)(4)(B), 33 U.S.C. 1313(d)(4)(B).

Each State must submit its water quality standards to EPA for review and approval. Upon approval by EPA, a state-adopted water quality standard "shall thereafter be the water quality standard for the applicable waters of that State." CWA § 303(c)(3), 33 U.S.C. 1313(c)(3).

2. This case involves the proposed Elkhorn Hydroelectric Project. Petitioners plan to build the project on the Dosewallips River, which drains western Washington's Olympic Peninsula. The River "flows east through the Olympic National Park, a national wilderness area, national forest land, and then private land before it empties into Hood Canal." Pet. App. 4a. The facility would be built just outside the Olympic National Park, *ibid.*, and we are informed by the United States Forest Service that it would be located on federally owned land within Olympic National Forest. Petitioners propose to operate the facility by diverting water from a 1.2-mile reach of the River (the bypass reach), running the water through turbines and then returning the water to the River. *Ibid.* Currently, the natural flows in this reach of the River are "essentially undiminished by

appropriation." Pet. App. 31a.<sup>1</sup> The River supports three species of anadromous fish: steelhead, and Coho and Chinook salmon. *Id.* at 32.

3. Petitioners filed their application for the Elkhorn project with FERC on March 18, 1986. Section 401(a) of the CWA, 33 U.S.C. 1341(a), requires an applicant for a license or permit for an activity that may result in a discharge into navigable waters to obtain a certification from the State where the discharge will occur. The certification must state that "any \* \* \* discharge" into navigable waters that results from the project "will comply with the applicable provisions of [33 U.S.C.] 1311, 1312, 1313, 1316, and 1317." Under Section 401(d) of the CWA, the state certification must set forth such limitations as will "assure that [the] applicant for a Federal license or permit will comply with any applicable \* \* \* limitations \* \* \* under [Section 301]" of the CWA "and with any other appropriate requirement of State law." 33 U.S.C. 1341(d). Accordingly, before FERC could act, petitioners had to obtain a Section 401 certification from the State of Washington.

Petitioners consulted with a number of state and federal fisheries, wildlife, and environmental agencies, including Washington's Department of Ecology (Ecology), as well as affected Indian tribes. In cooperation with the agencies and tribes, petitioners undertook a study of instream flow conditions on the Dosewallips. Based on that study, petitioners proposed minimum flows for the Elkhorn project's bypass reach of between 65 and 155 cfs (*i.e.*, cubic feet per second), depending on the season. Currently, the

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<sup>1</sup> There is nothing in the record to suggest that petitioners have obtained the right to use the water necessary for the project.

stream flow in that portion of the river ranges between 149 cfs and 738 cfs. Pet. App. 51a.

4. On June 11, 1986, Ecology issued a Section 401 water quality certificate imposing a number of conditions on the Elkhorn project. As relevant here, Ecology imposed a minimum stream-flow requirement of between 100 and 200 cfs, depending on the season. A state appeals board, however, determined that the minimum flow requirement was intended to enhance, not merely maintain, the Dosewallips fishery and that the flow regime therefore exceeded Ecology's authority under state law. Pet. App. 55a-57a.

6. Both petitioners and Ecology appealed to the state Superior Court. In an unpublished opinion issued on May 8, 1991, the Superior Court concluded that Ecology was empowered by CWA Section 401 to require petitioners to comply with Ecology's minimum flow regime. Pet. App. 29a-36a, 37a-45a. The Superior Court also concluded that Ecology had imposed the minimum flow requirement merely to protect the Dosewallips fishery, not to improve it, and that, in any event, Ecology was empowered under state law to impose conditions that improve, rather than merely maintain, water resources.

7. Petitioners appealed to the Washington Supreme Court. That court sustained Ecology's imposition of the minimum flow requirement under Section 401. Pet. App. 3a-28a. It found that the antidegradation provisions of the State's water quality standards required the imposition of the minimum flows. The court stated:

[CWA S]ection 401 requires states to certify compliance with state water quality standards. Washington's standards prohibit the degradation of the state's waters, and prohibit the degradation of fish habitat and spawning in the Dose-

wallips in particular. Therefore, section 401 required Ecology to certify that the Elkhorn project would not degrade fish habitat and spawning in the Dosewallips. Given that Ecology's fisheries biologists determined that the instream flows urged by [petitioners] risked such degradation, Ecology therefore could not issue the 401 certificate without imposing more protective instream flow conditions. Absent such a condition, Ecology could not assure compliance with state water quality standards.

Pet. App. 7a-8a.

The court also upheld the condition under CWA Section 401(d), which allows States to impose conditions based upon several enumerated sections of the CWA and "any other appropriate requirement of state law." 33 U.S.C. 1341(d). The court rejected petitioners' argument that the phrase "any other appropriate requirement of State law" was intended to include only water quality standards under CWA § 303, 33 U.S.C. 1313. Pet. App. 13a. The court referred to the express goals of the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a). Relying on "[t]his broad purpose," Pet. App. 11a, the court read Section 401(d) to confer on the States a broad power to "consider all state action related to water quality in imposing standards on section 401 certificates." Pet. App. 13a.

In addition, the court rejected the argument that allowing states to impose minimum flow requirements under Section 401 of the CWA is contrary to *California v. FERC*, 495 U.S. 490 (1990), in which this Court held that the California State Water Resources Control Board had no authority to impose minimum flow-requirements on projects licensed under the FPA. The Washington Supreme Court concluded that Sec-



tion 401 constitutes an independent grant of state power in the otherwise comprehensive scheme of federal regulation under the FPA. Pet. App. 20a-21a.

#### SUMMARY OF ARGUMENT

Under Section 401(a)(1) of the CWA, an applicant for a federal license—including a license from FERC to construct and operate a hydropower facility—that “may result in any discharge into the navigable waters” shall obtain a certification from the State involved “that any such discharge will comply” with designated provisions of the CWA. 33 U.S.C. 1341(a)(1). Such a certification under Section 401(d) of the Clean Water Act must set forth such limitations as will “assure that [the] applicant for a Federal license or permit will comply with any applicable \* \* \* limitations \* \* \* under [Section 301]” of the CWA “and with any other appropriate requirement of State law.” 33 U.S.C. 1341(d).

In this case, the State issued petitioners a Section 401 certification, but included in the certification a requirement that petitioners maintain a minimum stream flow once their project is built. The question presented in this case is whether the minimum flow condition imposed by the State is a valid Section 401(d) condition, *i.e.*, whether it is necessary to assure compliance with “any applicable \* \* \* limitations \* \* \* under section [301]” of the CWA “and with any other appropriate requirement of State law.”

The Washington Supreme Court’s decision should be affirmed. Even if, as petitioners argue, a State may impose a condition under Section 401(d) only to assure compliance of a “discharge” (a term used in Section 401(a)(1), but not Section 401(d)) with the State’s EPA-approved water quality standards,

petitioners’ project would cause two distinct discharges: the discharge of fill and construction material into the water to construct the dam and the discharge of water over or through the dam once it is built. Both discharges could reasonably be said to result in the problem the State identified: the lack of water in the bypass reach of the Dosewallips River that threatens the use of the river as a fish habitat. Thus, both discharges could reasonably be said to cause a violation of the State’s water quality standards.

Petitioners also contend that the minimum flow condition is not necessary to assure compliance with the State’s water quality standards, since no specific numerical criterion in those standards would be violated by the failure to maintain the minimum flow sought by the State. That contention is mistaken. The Washington Supreme Court relied on the designated and existing use of the Dosewallips River as fish habitat and on the State’s antidegradation policy. It is undisputed that designated uses are a component of state water quality standards, and the State therefore had authority to impose a minimum flow condition to assure that petitioners’ project would not be inconsistent with the use of the Dosewallips River as fish habitat. In addition, Congress, the EPA, and this Court have long recognized that anti-degradation policies are also an integral part of state water quality standards. Those policies assure that waters and their existing uses are not degraded. There is no reason why such policies may not be used, as here, to assure that an existing use of a body of water is not degraded, regardless of whether specific applicable water quality criteria are satisfied.

Petitioners' project also requires licensing by FERC. The Federal Power Act requires FERC, in consultation with other resource agencies, to make a number of determinations concerning the conditions under which petitioners must operate their project, including how best to protect the fish habitat in the Dosewallips River. Since FERC has not yet acted on petitioners' license application, there is no way to know whether any determination that FERC might make concerning petitioners' project would pose any conflict with the conditions imposed by the State in the Section 401 certification at issue in this case. Accordingly, this case does not present any question concerning the effect of the Section 401 conditions imposed by the State on any determination FERC must make in FPA licensing proceedings. In particular, since the basis of any conflict between a hypothetical FERC licensing decision and the Section 401 certification cannot be known, it would be inappropriate in this case to attempt to determine how any such hypothetical conflict should be resolved.

## ARGUMENT

### I. THE DECISION OF THE WASHINGTON SUPREME COURT SHOULD BE AFFIRMED BECAUSE THE INSTREAM FLOW CONDITION IMPOSED BY THE STATE IN THIS CASE IS A VALID SECTION 401(d) CONDITION

Petitioners contend (Br. 21-30) that the minimum flow condition imposed by the State falls outside the scope of Section 401 because the condition does not address a "discharge." That contention is mistaken. Even if a condition imposed under Section 401(d) were valid only if it assured that a "discharge" will comply with the State's water quality standards, the Section 401(d) condition imposed by the State in this case satisfies that test.

#### A. The State's Section 401(d) Minimum Flow Condition Addresses The Compliance Of A Discharge With Applicable Provisions Of The CWA

1. Section 401(a)(1) of the CWA requires an applicant for a hydropower license to obtain a state certificate that "any \* \* \* discharge" into navigable waters that results from the project "will comply with the applicable provisions of [33 U.S.C.] 1311, 1312, 1313, 1316, and 1317." 33 U.S.C. 1341(a). In this case, the State granted petitioners a certification under Section 401(a). But the State also imposed conditions on that certification pursuant to Section 401(d) of the CWA, 33 U.S.C. 1341(d). That provision does not use the term "discharge," as does Section 401(a)(1), but instead provides that a Section 401 certification "shall set forth any \* \* \* limitations \* \* \* necessary to assure that any applicant \* \* \* will comply" with certain provisions of the CWA or "any other appropriate requirement of State law."



The question presented in this case is whether the State's minimum flow requirement is a valid Section 401(d) condition. All parties appear to agree on the following proposition: the State's minimum flow requirement is a valid Section 401(d) condition if it is necessary to assure that discharges resulting from the project will comply with applicable provisions of the CWA or "any other appropriate requirement of State law." See, *e.g.*, Pet. Br. 26. In our view, the State's minimum flow condition satisfies that standard.<sup>2</sup>

2. Petitioners argue (Pet. Br. 21-30) that the minimum streamflow condition in this case is not a valid Section 401(d) condition because no discharges that result from their project would violate applicable CWA provisions or other appropriate requirements of state law. Two distinct discharges, however, that would violate the CWA result from petitioner's facility.

a. The first discharge caused by this project is the actual construction of the dam itself. Section 401(a) specifically recognizes that state certification is necessary for "any activity including, but not limited to, the *construction* or operation of facilities." 33 U.S.C. 1341(a)(1) (emphasis added). As petitioners acknowledge (Pet. Br. 28), the materials from which the dam is to be constructed must be "discharged" into the river to build the dam. Indeed, Section 404 of the

<sup>2</sup> It is therefore unnecessary to determine in this case whether Congress intended by the use of the term "applicant," rather than "discharge," in Section 401(d) to grant States a broader power to condition certifications under Section 401(d) than to deny them under Section 401(a) and, if so, whether there are limitations on the States' authority to impose such conditions.

Clean Water Act requires petitioners to obtain a federal permit for that initial construction activity.<sup>3</sup>

If an effect of a discharge would violate the State's Section 303 water quality standards, a State may refuse to certify that the "discharge will comply with the applicable provisions of [Section 303 of the CWA]," 33 U.S.C. 1341(a)(1), or may condition its certification to ensure such compliance. For example, discharge of a particular material into a river that would be harmless in itself could, when combined with materials already in the river, produce pollutants that would violate a State's water quality standards. In this case, the effect of the discharge of the construction materials will be to complete a diversion structure that, it is alleged, will cause or contribute to a violation of state water quality standards. In those circumstances, the State could surely find that the discharge of the material would not comply with the State's water quality standards.

Moreover, the inference that operation of a facility is an effect of the construction of that facility is specifically embodied in the CWA itself. Under Section 401(a)(3), 33 U.S.C. 1341(a)(3), the certification provided by a State for construction of a facility satisfies the certification requirement for operation of the facility unless there are changes either in the facility's operation, the State's water quality standards, or the characteristics of the water. As EPA has explained in guidance to the States on implementation of Section 401, "because the States' certification of a construction permit or license also op-

<sup>3</sup> That federal permit is also subject to state review for compliance with water quality standards under Section 401. See *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 48 (D.C. Cir.), cert. denied, 484 U.S. 816 (1987).

erates as certification for an operating permit, \* \* \* it is imperative for a State review to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project." EPA, *Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes* 22 (Apr. 1989). EPA's interpretation of Section 401 as including indirect effects of a discharge of construction materials is entitled to deference. *Arkansas v. Oklahoma*, 112 S. Ct. 1046 (1992); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In sum, if the operation of the dam would violate the applicable provisions of the CWA, the violation is an indirect effect of the discharge of material to build the dam. Accordingly, the State may impose a condition in a Section 401 certificate to assure that the discharge of fill and construction materials does not result in lack of compliance with the CWA when the dam is in operation.

b. A second "discharge" is found at the point where the water not needed to run the turbines is released at the dam itself. Petitioners contend (Pet. Br. 25) that this release of water is not a "discharge," but is a "modification" of the stream-flow not subject to the provisions of Section 401. However, as petitioners later note (Pet. Br. 28 n.20), "dams \* \* \* contain other mechanisms for releasing water into the stream below, including such devices as crest-gates, sluice-gates and release valves that may be used to reduce pressure behind the dam, to spill water over the top during high water or to allow for maintenance on the turbine facility." Thus, when the operator of the dam releases water through a crest-gate, sluice-gate,

release valve, or other similar device, it has caused a discharge within the meaning of Section 401.<sup>4</sup>

It is that discharge that the State here has conditioned in its water quality certification. Once again, if that discharge would result in a failure to comply with the applicable CWA provisions, the State may

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<sup>4</sup> We note that Sections 301 and 402 of the Act require a permit for the "discharge of any pollutant," i.e., for the addition of any pollutant to a water of the United States from a point source. See CWA § 502(12), 33 U.S.C. 1362(12) (defining "discharge of a pollutant"). We do not suggest here, however, that the term "discharge" in those two Sections extends to activities which do not involve either a "pollutant" or an "addition" of a pollutant to navigable waters. See *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988); *United States v. Tennessee Water Quality Control Bd.*, 717 F.2d 992, 997-998 (6th Cir. 1983), cert. denied, 466 U.S. 937 (1984); *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *Missouri v. Department of Army*, 672 F.2d 1297, 1304 (8th Cir. 1982). Indeed, Congress employed the term "discharge" when used without qualification (as in Section 401(a)) more broadly than the term "discharge of any pollutant," which is used in a number of other provisions of the CWA. See, e.g. 33 U.S.C. 1311(a), 1311(h), 1312, 1316(a) (1), 1323(a), 1342(a) (1). See CWA § 502(16), 33 U.S.C. 1362(16) ("The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.") (emphasis added).

Petitioners cite (Pet. Br. 29-30) the two *National Wildlife Federation* cases for the proposition that hydropower structures do not cause a "discharge" that may be addressed under Section 401. Those cases, however, involve the scope of the term "discharge of any pollutant" under Section 402, 33 U.S.C. 1342. As discussed above, the term "discharge" as used in Section 401(a) is broader than "discharge of any pollutant." For that reason, even petitioners do not appear to adopt Amicus Niagara Mohawk Power Corporation's argument (Amicus Br. 11) that a Section 401(d) condition is valid only if it regulates discharges "of pollutants." See Pet. Br. 22 (specification of "discharge" to "include" a discharge of a pollutant is "not actually definitional").



impose conditions on a certification to assure that it does not.

**B. The Washington Supreme Court Appropriately Found That The Minimum Flow Condition Was Necessary To Assure That Petitioners' Hydropower Project Would Comply With Applicable CWA Provisions**

1. The Washington Supreme Court found that operation of petitioners' hydropower project would violate the CWA because it would cause a violation of the water quality standards promulgated by the State and approved by EPA under CWA § 303, 33 U.S.C. 1313. In particular, the court found that the State's water quality standards included designated uses for the water (in this case, as fish habitat), and an antidegradation policy requiring that existing uses (including use as fish habitat) be maintained.<sup>5</sup> The court also found that the minimum flow condition to be imposed in the bypass reach was necessary to assure that the river could continue to be used as fish habitat. Accordingly, the court found that the minimum flow condition was a valid Section 401 condition—i.e., it was necessary to assure that the operation of the project would comply with state water quality standards. Pet. App. 7a-8a.

It is undisputed that a State may impose Section 401(d) conditions on a certificate in order to assure compliance with state water quality standards duly promulgated under Section 303 of the Clean Water Act, 33 U.S.C. 1313. See, e.g., Pet. App. 7a; Pet. Br. 31. Although Section 401(d) does not expressly refer

<sup>5</sup> Washington State's policy provides that "[e]xisting beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed." Wash. Admin. Code 173-201-035(8) (a) (1990); see Pet. App. 7a.

to Section 303, at least two independent statutory sources establish that a State may include conditions in a Section 401 certification necessary to assure compliance with Section 303. Section 401(d) itself permits States to include conditions necessary to assure compliance with "any other appropriate requirement of State law." Regardless of what else that phrase connotes,<sup>6</sup> it certainly includes state water quality standards duly promulgated by the State and approved by EPA under Section 303. In addition, Section 401(d) permits States to include conditions necessary to assure compliance with Section 301, 33 U.S.C. 1311. As petitioners note (Pet. Br. 44), Section 301 expressly incorporates, through Section 301(b)(1)(C), 33 U.S.C. 1311(b)(1)(C), water quality standards under Section 303.<sup>7</sup> Accordingly,

<sup>6</sup> Since the decision of the Washington Supreme Court can be affirmed on the apparently undisputed premise that "any other appropriate requirement of State law" refers to state water quality standards, it is not necessary to reach the question of what *other* requirements of state law, if any, are included within the meaning of that phrase. Compare Pet. App. 10a, 13a. Compare *Central Maine Power Co.*, 52 F.E.R.C. ¶ 61,033 (1990) (discussing Maine's imposition of conditions concerning recreation facilities); *Allegheny Electric Coop.*, 51 F.E.R.C. ¶ 61,268, at 61,846 n.169 (1990) (discussing West Virginia's imposition of conditions related to recreation and consultation).

<sup>7</sup> Section 301(b)(1)(C) states that "there shall be achieved" by a certain date "any more stringent limitation, including those necessary to meet *water quality standards* \* \* \*, established pursuant to any State law or regulations \* \* \*, or required to implement any applicable *water quality standard* established pursuant to [the CWA]." 33 U.S.C. 1311(b)(1)(C) (emphasis added).

When Congress added the reference to Section 303 in Section 401(a) in 1977, Congress explained that "[t]he inclusion of section 303 is intended to clarify the requirements of section 401" and that "Section 303 is always included by refer-

when Section 401(d) permits States to condition their certifications to assure compliance with Section 301, it thereby permits States similarly to condition their certifications to assure compliance with water quality standards adopted pursuant to Section 303.

2. Petitioners complain (Pet. Br. 33-37) that the State's application of its designated uses and its antidegradation policy to protect a designated and existing use of the waters as fish habitat was improper, because the CWA depends solely on "objective criteria" to maintain and enhance water quality.

Petitioners' contention is mistaken. Water quality criteria can be, and frequently are, expressed in narrative terms, such as "there shall be no discharge of toxic pollutants in toxic amounts." See *American Paper Institute, Inc. v. EPA*, 996 F.2d 346 (D.C. Cir. 1993). EPA has frequently translated such narrative criteria into specific requirements in Section 402 permits. See *American Paper Institute*, 996 F.2d at 350-353; *Champion Int'l Corp. v. EPA*, 850 F.2d 182, 184 (4th Cir. 1988). There is no reason

ence where section 301 is listed." H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977), reprinted in Congressional Research Service, *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act*, Vol. III, at 280 (1978).

Indeed, the failure specifically to enumerate Section 303 in Section 401(d) is an artifact of the way Congress amended the statute in 1977. The 1977 amendments provide that "Section 401 \* \* \* is amended by inserting '303,' after '302' in the phrase 'sections 301, 302, 306, and 307 of this Act,' and in the phrase 'section 301, 302, 306, or 307 of this Act,' each time these phrases appear." Clean Water Act of 1977, Pub. L. No. 95-217, § 64, 91 Stat. 1599. Section 401(d) included descriptions of Sections 301, 302, 306, and 307, rather than simply listing those sections, as did Section 401(a)(1). Accordingly, although the word "303" was added to the list in Section 401(a)(1), the amendments did not expressly add the word "303" to Section 401(d).

why antidegradation policies, which are highly analogous to such narrative water quality criteria, should be treated differently.<sup>8</sup>

3. Petitioners also argue (Pet. Br. 35-36) that antidegradation requirements cannot be an independent, enforceable component of state water quality standards. Section 303(a)(1) of the CWA, 33 U.S.C. 1313(a)(1), provides that state water quality standards in existence at the time of the 1972 amendments to the CWA were generally to remain in effect and could be modified only as deemed necessary through the triennial review process outlined in Section 303(c), 33 U.S.C. 1313(c). At the time of the enact-

<sup>8</sup> Petitioners draw an artificial distinction between what they term "water quantity" and "water quality" issues, and argue that water quantity can never affect water quality—apparently even when a lowering of the volume of the water in a river would entirely destroy all of its uses. See Pet. Br. 37-42. In support of that implausible contention, they argue (Pet. Br. 37) that "[w]ater quantity issues are excluded from the CWA by §§ 101(g) and 510(2) [of the CWA]." Section 101(g) provides that "[i]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA]" and that "nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." 33 U.S.C. 1251(g). Section 510(2) provides that "nothing in this chapter shall \* \* \* be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters \* \* \* of such States." 33 U.S.C. 1370(2). Those provisions thus generally preserve to each State the authority to determine who has the right to various quantities of water within its jurisdiction. *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985). Nothing that has happened in this case would alter the State's authority in that regard. Indeed, nothing in the record suggests that the State has yet allocated water rights for the project. Accordingly, Sections 101(g) and 510(2) have no bearing on this case.



ment of the 1972 amendments, the water quality standards of all 50 States included antidegradation provisions. See Hines, *A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clean Air and Clean Water*, 62 Iowa L. Rev. 643, 658-660 (1977). By providing that existing water quality standards were to remain in effect, Congress in 1972 recognized that the antidegradation provisions then in effect retained legal force.<sup>9</sup>

The consistent regulatory construction of Section 303 over the past twenty years establishes that an antidegradation policy is an integral part of a State's water quality standards. EPA has continuously required by regulation that state water quality standards must include an antidegradation policy in order to receive EPA approval, see 40 C.F.R. 131.6(d), and has specified the required content of such a policy, see 40 C.F.R. 131.12.<sup>10</sup> Indeed, in an amendment to Section 303 passed in 1987, Congress specifically recognized that antidegradation policies were an essential part of water quality standards. The amendment

<sup>9</sup> There were numerous indications of Congress's approval of the antidegradation concept in the legislative history. See, e.g., H.R. Rep. No. 911, 92d Cong., 2d Sess. 20 (1972), reprinted in 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972* (CWA Leg. Hist.), 93d Cong., 1st Sess. 772 (Comm. Print 1973); S. Rep. No. 414, 92d Cong., 1st Sess. 19-20 (1971), reprinted in 2 CWA Leg. Hist. 1437-1438. See also CWA § 101(a), 33 U.S.C. 1251(a) ("The objective of [the CWA] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.") (emphasis added).

<sup>10</sup> Precursors of the current regulations can be found at 40 C.F.R. 130.22(a) (1974); 40 C.F.R. 130.17(e) (1976); 40 C.F.R. 35.1550(e) (1979).

provided that "any effluent limitation \* \* \* established under this section \* \* \* may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section." 33 U.S.C. 1313(d)(4)(B) (emphasis added).

Finally, this Court has recognized that a State's antidegradation policy is an integral, legally enforceable component of a State's Section 303 water quality standards and that application of that policy may determine whether a particular activity complies with those standards. In *Arkansas v. Oklahoma*, 112 S. Ct. 1046 (1992), the primary contention was that permitting a particular discharge would, in the Court's terms, "violate[] the [state] water quality standards," which provide that "'no degradation \* \* \* shall be allowed' [in the body of water at issue]." *Id.* at 1051. The Court then considered whether EPA's application of the State's antidegradation provision was appropriate. In the course of doing so, the Court repeatedly referred to the antidegradation policy as a part of the State's water quality standards, see *id.* at 1058 n.13, 1059, and applied the policy as a legally enforceable requirement under the CWA.

4. The State also justified the Section 401(d) condition in this case as necessary to protect the River's designated use. Under Section 303(c)(2)(A) of the CWA, new or revised water quality standards "shall consist of the designated uses \* \* \* and the water quality criteria." 33 U.S.C. 1313(c)(2)(A). Petitioners seize on that language to argue (Pet. Br. 31-35) that a State may not impose a Section 401(d) condition to protect a designated use, but may do so only to enforce specific water quality criteria. According to petitioners, the State's attempt to protect a designated use "improperly treats 'and' [in Section 303(c)(2)(A)] as if it meant 'or'" (Pet. Br. 32) by

imposing a condition to protect a designated use where no specific water quality criterion is applicable.

Petitioners' argument is based on a misreading of the statutory language. Petitioners agree that a State may impose a Section 401(d) condition to assure compliance with state water quality standards. By the literal terms of Section 303(c)(2)(A), water quality standards consist of "designated uses \* \* \* and \* \* \* water quality criteria." If a new project would be inconsistent with a designated use, the fact that it might comply with the State's water quality criteria would thus be irrelevant. Its inconsistency with the designated use would alone be sufficient to establish, under the literal terms of the statute, that it did not comply with the designated use *and* the water quality criteria, *i.e.*, with applicable water quality standards. Since failure to achieve the minimum flow requirement would be inconsistent with the designated use of the Dosewallips River as fish habitat, imposing the minimum flow requirement is necessary to achieve compliance with applicable water quality standards.

**II. THIS CASE PRESENTS NO QUESTION CONCERNING THE EFFECT OF THE STATE'S SECTION 401(d) CERTIFICATION CONDITIONS ON THE FPA LICENSE, IF ANY, THAT FERC ULTIMATELY DECIDES TO ISSUE FOR PETITIONERS' PROJECT**

For reasons explained above, we believe that respondents' Section 401(d) certification was valid, and the decision of the Washington Supreme Court therefore should be affirmed. Petitioners argue, however, that our interpretation of the Clean Water Act should be rejected because it would create a conflict between the State's authority under Section 401(d) and various powers granted to FERC under the Federal Power Act (FPA). In particular, petitioners and

their amici argue that the FPA authorizes FERC to determine minimum instream flows, and that the CWA therefore ought not be interpreted to permit the States a similar authority under Section 401.

In our view, there is no conflict at this time between the powers granted FERC by the FPA and the powers granted the State of Washington by the CWA. Under Section 10(j) of the FPA, 16 U.S.C. 803(j), FERC must include in a hydropower license conditions "to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project." If and when FERC determines for specific reasons that a stream-flow different from that imposed by the State is required by the FPA, the effect of that determination—and the consequent reconciliation of the Federal Power Act and the Clean Water Act—will be ripe for consideration by FERC and on a petition for review in federal court of any such FERC decision. In short, in its present posture, this case does not present any question concerning the effect of the State's Section 401(d) certification conditions on various decisions FERC must make in determining whether and under what conditions to license the project under the FPA.

1. Part I of the FPA was originally enacted as the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063, and constitutes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation." *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 180 (1946). The purpose of the statute was to centralize authority over hydropower projects, which commonly involve bodies of water that flow through, affect, or border a number of States, in a single federal agency—first, the Federal Power Commission,



now FERC. See *id.* at 174. The FPA requires any party constructing a hydroelectric project that is on navigable waters or federal lands or that will affect interstate commerce, to obtain a license from FERC. FPA § 4(e), 16 U.S.C. 797(e). In deciding whether to issue such a license, FERC must, "in addition to the power and development purposes for which licenses are issued, \* \* \* give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." *Ibid.* See also *Udall v. FPC*, 387 U.S. 428 (1967). Section 10(a) of the FPA gives FERC the power to impose conditions in a license so that the project is "best adapted to a comprehensive plan for improving or developing a waterway," which specifically includes protection and enhancement of fish habitat as well as other beneficial public uses. 16 U.S.C. 803(a).

To be sure, the statute does impose limits on FERC's authority. See, e.g., *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984) (discussing requirement in 16 U.S.C. 797(e) that hydropower license for project within federal reservation must contain conditions determined necessary by responsible cabinet officer); 16 U.S.C. 823a(c) (FERC exemption from licensing for a hydropower project of 15 megawatts or less using a manmade conduit must contain conditions deemed appropriate by relevant federal or state fish and wildlife agency). One of those limits is found in Section 10(j) of the FPA. Under that provision, which was enacted as part of the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243, each license must include conditions "to adequately and

equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project." 16 U.S.C. 803(j)(1). Such conditions shall be based on recommendations from the National Marine Fisheries Service, the Fish and Wildlife Service, and state fish and wildlife agencies. *Ibid.* If FERC finds that such a recommendation is "inconsistent with the purposes and requirements" of the FPA, it must attempt to resolve any such inconsistency, giving "due weight to the recommendations, expertise, and statutory responsibilities" of the recommending agency. 16 U.S.C. 803(j)(2). Finally, if no reconciliation is possible and FERC fails to adopt such a recommendation "in whole or in part," it must both explain why the agency's recommendation is inconsistent with the FPA, 16 U.S.C. 803(j)(2)(A), and find "that the conditions selected by the Commission comply with" the requirement to protect, mitigate damages to, and enhance, fish and wildlife affected by operation of the project, 16 U.S.C. 803(j)(2)(B). Cf. *United States Dep't of Interior v. FERC*, 952 F.2d 538, 545 (D.C. Cir. 1992); *National Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1480 (D.C. Cir. 1990).

In *California v. FERC*, 495 U.S. 490 (1990), this Court considered the scope of FERC's authority under the FPA to set stream-flow conditions.<sup>11</sup> The Court reaffirmed the holding of *First Iowa* that, aside from instances where authority was "'saved' to the States" by specific FPA provisions, Congress intended "to let the supersedure of the state laws by federal legislation take its natural course." 495 U.S. at 498.

<sup>11</sup> Since the State in *California v. FERC* had not attempted to impose a condition in its Section 401 certification, this Court had no occasion to consider the application of the Clean Water Act in that case.

In *First Iowa*, that principle led the Court to hold that the FPC had the responsibility to set minimum stream flows. In *California v. FERC*, the Court reached the same conclusion, specifically noting that "Congress has amended the FPA [in the ECPA amendments] to elaborate and reaffirm *First Iowa's* understanding that the FPA establishes a broad and paramount federal regulatory role." 495 U.S. at 499.

2. This case does not present any question concerning whether and under what circumstances a determination by FERC under the FPA concerning appropriate stream-flow conditions could have an effect on different stream-flow conditions imposed by the State in a Section 401 certification. It is common ground that Section 401(d) of the CWA grants the States authority to require that hydropower projects (or at least the discharges resulting from such projects) comply with various provisions of the CWA, including (at least) state water quality criteria. Where a State imposes a Section 401(d) condition to assure compliance with such criteria, that condition necessarily becomes part of the FERC-issued federal license. Similarly, it is clear that the FPA authorizes—indeed, requires—FERC to impose license conditions of various sorts for protection of fish habitats. The disputed point is the relatively narrow question of whether a State may impose a stream-flow condition under Section 401 that is required not to enforce a State's numerical water quality criteria, but to protect the designated and existing use of the body of water from degradation.

For the reasons we have given above, in our view a State generally does have authority to impose a stream-flow condition in the above circumstances. But that authority may have limitations in the context of FPA licensing of a hydroelectric facility. In particular, a case could arise where FERC has determined

that a particular instream flow is required by the FPA, and where that flow is different from the minimum flow condition imposed by the State. In that case, a question would be presented concerning how to harmonize the competing regulatory schemes.

That question could be answered in a variety of ways. It is possible that, in such circumstances, the state minimum flow condition would prevail, since CWA Section 401(d) unequivocally states that conditions included in the Section 401 certificate "shall become a condition on" the federal license. 33 U.S.C. 1341(d). It could be argued, on the basis of that statutory language, that federal licensing authorities such as FERC have no authority to avoid the State's conditions. It also could be argued, however, that in such circumstances FERC's stream-flow condition would prevail, in light of the FPA's grant of authority to FERC over just such matters. Indeed, it could be argued that the FPA in effect gives FERC authority to balance the various possible uses of the body of water and that FERC's resulting determination is in effect a designation of the appropriate use of the body of water for hydropower licensing purposes. If that were so, FERC's determination would disable the State from relying on its own designated use to impose its condition.<sup>12</sup>

3. For present purposes, the crucial point is that this case does not present any question concerning the effect of a hypothetical FERC determination that disagreed with the State's stream-flow condition. In our view, it would be inappropriate to use this case as a vehicle to resolve such a hypothetical conflict.

<sup>12</sup> Cf. *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992); *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives Ass'n*, 491 U.S. 490, 510 (1989); *United States v. Fausto*, 484 U.S. 439, 453 (1988).



First, since FERC has not yet acted on petitioners' license application, it is possible that FERC will deny petitioners a license altogether. If so, that would render moot any dispute concerning conditions imposed by the State's Section 401 certification.<sup>13</sup>

Second, even if FERC were to decide to issue petitioners a license, it is doubtful whether any conflict between FERC and the State would develop. Under the FPA, FERC is obligated to "give equal consideration to" the protection of fish habitat when determining whether to issue a license for a hydropower project. FERC is also obligated to impose such conditions (including minimum flow conditions) as are recom-

<sup>13</sup> Indeed, petitioners' application must overcome several obstacles in order to obtain approval as proposed. The land management plans for the Olympic National Forest, in which petitioners' project would be built, are currently being re-evaluated due to the litigation involving the northern spotted owl in the Pacific Northwest. See *Seattle Audubon Society v. Espy*, 998 F.2d 699 (9th Cir. 1993). Under the preferred alternative proposed in the Draft Supplemental Environmental Impact Statement published in July 1993, the area around the Dosewallips River would be considered a Tier I key watershed. Pending completion of a watershed analysis, the plan calls for creation of a Riparian Reserve of at least 300 feet on each side of the river. Special management guidelines are to apply in such areas, i.e., they "prohibit activities not designed specifically to maintain and restore the structure and function of the reserve and benefit fish habitat." Draft SEIS at 2-16. Moreover, the draft land management plan includes guidelines calling for "in-stream flows and habitat conditions that maintain or restore riparian resources." Draft SEIS at B-87.

The Environmental Impact Statement is scheduled to be completed in February 1994; final decisions amending the National Forest Plans involved are expected in March 1994. If the proposed plans are made final, it would be doubtful whether FERC, which must ensure that a hydropower license "will not interfere or be inconsistent with the purpose for which [the national forest] was created," 16 U.S.C. 797(e), could issue a license for petitioners' project.

mended by Washington's wildlife agency to protect and enhance the fish habitat, unless FERC determines that such conditions are inconsistent with the FPA. Even where FERC finds such an inconsistency, FERC must nonetheless impose other conditions that are consistent with the FPA to protect and enhance the fish habitat. In light of those standards, it may well be that FERC will not reach a different conclusion from that reached by the State concerning the minimum flow requirements to be imposed on petitioners' project.

Third, even if it were likely that a conflict would develop between FERC's determination under the FPA of what protections should be afforded fish habitat and the State's minimum flow conditions, it would be inappropriate to anticipate that conflict and seek to resolve it in this case. If FERC finds that the State's condition is inconsistent with conditions FERC must impose pursuant to the Federal Power Act, it can either attempt to refuse to include the State's conditions in a license it grants or it can include the conditions, but present its own views concerning their legal status. In either event, FERC's determination can be tested on judicial review of FERC's licensing decision, based on a full administrative record and a concrete controversy. Compare *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772-779 (1984).

## CONCLUSION

The Court should affirm the judgment of the Washington Supreme Court.

Respectfully submitted.

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DECEMBER 1993

## APPENDIX

1. Section 101 of the Clean Water Act, 33 U.S.C. 1251, provides in relevant part:

**§ 1251. Congressional declaration of goals and policy**

**(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective**

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(1a)



(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

**(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States**

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

\* \* \* \* \*

**(d) Administrator of Environmental Protection Agency to administer chapter**

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter challed "Administrator") shall administer this chapter.

\* \* \* \* \*

**(g) Authority of States over water**

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

2. Section 303 of the Clean Water Act, 33 U.S.C. 1313, provides in relevant part:

**§ 1313. Water quality standards and implementation plans**

**(a) Existing water quality standards**

(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to

October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3) (A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws

water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

#### **(b) Proposed regulations**

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if—

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be



consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

**(c) Review; revised standards; publication**

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and

other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a state reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he

shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter. The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) **Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision**

\* \* \* \* \*

(4) **Limitations on revision of certain effluent limitations.—**

(A) **Standard not attained.**—For waters identified under paragraph (1)(A) where the ap-

plicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) **Standard attained.**—For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

3. Section 401 of the Clean Water Act, 33 U.S.C. 1341, provides in relevant part:

#### § 1341. Certification

(a) **Compliance with applicable requirements; application; procedures; license suspension**

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the



navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, inter-

state agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect

to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a

certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where



actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

**(b) Compliance with other provisions of law setting applicable water quality requirements**

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provisions of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

**(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees**

In order to implement the provisions of this section, the Secretary of the Army, acting

through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

**(d) Limitations and monitoring requirements of certification**

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard or performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

4. Section 502 of the Clean Water Act, 33 U.S.C. 1362, provides in relevant part:

**§ 1362. Definitions**

Except as otherwise specifically provided, when used in this chapter:

\* \* \* \* \*

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical

wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

\* \* \* \* \*

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

\* \* \* \* \*

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

\* \* \* \* \*

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.



